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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-486

COUNCIL FOR EMPLOYMENT AND
ECONOMIC ENERGY USE,
Petitioner

v.

WHDH CORPORATION ET ALS.,
Respondents

Petition for a Writ of Certiorari
to the First Circuit Court of Appeals

Sanford A. Kowal
294 Washington Street
Boston, Massachusetts 02108

Albert P. Zabin
One Center Plaza
Boston, Massachusetts 02108

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No._____

COUNCIL FOR EMPLOYMENT AND ECOMONIC ENERGY USE, Petitioner

v.

WHDH CORPORATION ET ALS., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE FIRST CIRCUIT COURT OF APPEALS

The Petitioner, Council for Employment and Economic Energy Use, respectfully prays that a writ of certiorari issue to review the judgment opinion of the United States Court of Appeals for the First Circuit entered in June 23, 1978.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at and a copy of the opinion appears in the Appendix hereto. A copy of the opinion of the United States District Court for the District of Massachusetts also appears in the Appendix hereto.

JURISDICTION

The final judgment of the United States Court of Appeals for the First Circuit was entered on June 23, 1978. This petition for a Writ of Certiorari was filed within ninety (90) days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether or not the Court erred in holding that the present case falls outside the scope of the Sherman Act.

2. Whether or not the Petitioner, as a consumer in a commercial transaction, should be denied protection of the Sherman Act solely because it is a political entity.

3. Whether or not the Court erred in granting the 12(b)6 motion to dismiss for failure to state a claim.

4. Whether or not the Petitioner should be denied the injunctive relief it seeks pursuant to 15 U.S.C. §26.

5. Whether or not the Court erred in denying Petitioner's motion to alter judgment and for leave to file an amended complaint.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

15 U.S.C. 1:

Trust, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the Court.

15 U.S.C. 15:

Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. 26:

Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, that nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

47 U.S.C. 315

Candidates for Public office--Equal opportunities requirement; censorship prohibition; allowance or station use; news appearances exception; public interest; public issues discussion opportunities.

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station; Provided, that such license shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any:

(1) bona fide newscast,
(2) Bona fide news interview,
(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcaster,

in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

BROADCAST MEDIA RATES

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed:

(1) during the forty-five (45) days preceding the date of a primary or primary runoff election and during the sixty (60) days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

DEFINITIONS

(c) For purposes of this section:

(1) the term "broadcasting station" includes a community antenna television system; and

(2) the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.

RULES AND REGULATIONS

(d) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

MASSACHUSETTS GENERAL LAWS
Chapter 55 Section 6

Restrictions on expenditures; penalties

A political committee organized or operating on behalf of a candidate for the office of governor, lieutenant governor, attorney general, state secretary, treasurer and receiver general, or auditor may receive pay and expend money or other things of value for reasonable and necessary expenses directly related to the campaign of the candidate but shall not make any expenditure that is primarily for the candidate's or any other person's personal use, provided however, that the director shall establish reasonable rules and regulations concerning such expenditures; and provided, further that no such committee, other than the state committee of a political party, may contribute to any other political committee or to the campaign fund of any other candidate.

Any other political committee, duly organized, may receive, pay and expend money or other things of value for the enhancement of the political future of the candidate or the principle, for which the committee was organized

so long as such expenditure is not primarily for the candidate's or any other person's personal use, provided, however, that the director shall establish reasonable rules and regulations concerning such expenditures; and provided, further, that such committee may contribute to other political committees and may contribute to the campaign fund of a candidate; and provided, further, that the aggregate of all such contributions made by such a committee organized on behalf of a candidate to another nonelected political committee organized on behalf of a candidate shall not exceed in any one calendar year the sum of one hundred dollars; and provided further, that the aggregate of all such contributions made by such a committee organized on behalf of candidates shall not exceed in any one calendar year the sum of fifteen hundred dollars. Such committee may place surplus finds in a savings account and may earn interest thereon but it may not invest its funds or other things of value in any other manner. Violation of any provision of this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars.

United States Constitution, Article I, Section 8, Clause 3:

Section 8. The Congress shall have Power to lay and collect Taxes, Duties,

Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Federal Rules of Civil Procedure, 8 (a):

(a) Claims for Relief

A pleading which sets forth a claim for relief, whether an original claim, counter claim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the Court already had jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Federal Rules of Civil Procedure 59 (e):

(e) Motion to Alter or Amend a Judgment

A Motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

STATEMENT OF THE CASE

A. Facts

In the November, 1976 election, the citizens of Massachusetts were asked to vote on a ballot proposition which, had it been adopted, would have changed the utility rate structure in that state by creating a uniform or flat rate for all users of electricity. During the course of the election campaign, Petitioner, a political committee, organized under M.G.L. c55, to oppose the adoption of the proposition, began on October 4, 1976, to purchase spot advertisements on certain radio stations for the purpose of presenting its views and urging a "No" vote on that ballot proposition.

An organization known as Massachusetts Fair Share, Inc., (hereinafter MFSI) which was working for a "Yes" vote on the proposition, requested free time from these same radio stations for its own advertising, stating: "...we do not expect to be able to match the paid advertising of our opponents". MFSI did not state that it did not have the financial resources to purchase advertising. Indeed, it could not have so stated as it did have the financial resources to purchase advertising time.

On or about October 8, 1976, the Respondents, all broadcasters in Boston, Massachusetts (General Electric Broadcasting Co., WHDH Corp and Plough Broadcasting Co.) their agents, servants or employees entered into an illegal combination and/or conspiracy

in restraint of trade by doing acts, including providing that for every two advertisements on their radio stations purchased by the Petitioners, their agents, servants or employees, to promote the Petitioner's opposition to Question 7, said licensees, their agents, servants or employees, would provide one free advertising space to MFSI. This was done without any inquiry by the licensees, their agents, servants or employee, into MFSI's ability to pay and without reference to the separate coverage of Question 7 afforded by each individual radio station owned by the licensees and in violation of 15 U.S.C. 1 et seq.

B. Proceedings Below

Pursuant to 15 U.S.C.§1 et seq., and 15 U.S.C. §15, Petitioner filed a private anti-trust action in the United States District Court for the District of Massachusetts on November 2, 1976. The Respondents, General Electric Broad Casting Co., WHDH Corp., and Plough Broadcasting Co., filed answers and Motion to dismiss for failure to state a claim upon which relief could be granted the Petitioner filed Oppositions to the Motion to dismiss. On May 10, 1977, the Court granted the Respondent's Motion to dismiss by dismissing the complaint as to all defendants.

On May 13, 1977, Petitioner filed a Motion to vacate the order of dismissal. Oppositions were filed on May 19th. On May 20, 1977, Petitioner filed a Motion to alter judgment and for leave to file an amended

complaint. On May 23, 1977, Petitioner filed a Motion for leave to file a reply brief in support of its Motion to vacate the order of dismissal. On May 24 the Court denied Petitioner's Motion to vacate order of dismissal and to alter judgment and for leave to file an amended Complaint.

On June 7, 1978, the Petitioner filed its Notice of appeal and costs bond, with the United States Court of Appeals for the First Circuit. On June 23, 1978, the United States Court of Appeals for the First Circuit denied the Petitioner's appeal and affirmed the judgment of the United States District Court.

REASONS FOR GRANTING THE WRIT

I. The Issues Raised In This Case Present Novel Anti-Trust Ramifications in the Application of the "Fairness Doctrine" Pursuant to 47 U.S.C. §315

This case involves an instance where the purchaser of advertising time from radio stations has for the first time raised fundamental questions as to the anti-trust ramifications in the application of the Fairness Doctrine.
15 U.S.C. §1 provides in part:

> "Every contract, combination, in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several states or with foreign nations is declared to be illegal"

The meaning of the phrase "... commerce among the several states" as found in Article 1 §8 clause 3 of the United States Constitution is quite broad and has been held to include: The practice of law (Goldfarb vs. Virginia State Bar 421 U.S. 773, 787, 1975); The furnishing of news (Associated Press vs. U.S.; 326 U.S. 1, 7, 1945); The furnishing of entertainment (U.S. vs. Paramount Pictures, Inc. 334 U.S. 131, 1947); Political activity (George W. Whitten, Jr., Inc. vs. Paddock Pool Builders, Inc., 424 F.2d 25, 32 1st Cir 1970 Cert. denied 421 U.S. 1004.

In enacting 15 U.S.C.1, it was the intent of Congress to exercise the full extent of its Commerce Clause authority. Pevely Dairy Co. vs. U.S., 178 F.2d 363,366, 8th Cir 1949 Cert. denied 339 U.S. 942; U.S. vs. Chrysler Corp. Parts Wholesalers,180 F.2d 557, 559,9th Cir 1950; Gough vs. Rossmoor Corp., 487 F.2d 373, 375-376, 9th Cir 1973; Rasmussen vs. American Dairy Assn., 472 F.2d 517, 521, 10th Cir 1972, cert. denied 412 U.S. 950. Mandeville Island Farms Inc. vs. American Crystal Sugar Co., 334 U.S. 219, 229-235, 1947.

The Court in U.S. vs. South Eastern Underwriters Association, 332 U.S. 533, 553, 1945 stated with respect to the trade or commerce language found in U.S.C. 1: "Language more comprehensive is difficult to conceive."

In the present case, the selling of broadcast advertising time is clearly within the meaning of the Act. This conclusion rests on two basis.

First, the broadcast media falls within the meaning of "trade and commerce" and is subject to the provisions of the anti-trust laws. U.S. vs. International Boxing Club of N.Y., 150 F.Supp. 397, 420 D.C. S.D. N.Y. 1957 affirmed 358 U.S. 242; U.S. vs. National Football League, 116 F.Supp. 319, 327-328 D.C. E.D. Pa. 1953.

The restraint in the present case involves a conspiracy between four radio stations in the allocation ratio of free response broadcast time afforded MFSI. This fact alone is sufficient to bring the case within the proscriptions of the Act.

A second independent basis for satisfying the "trade or commerce" requirement of 15 U.S.C. §1 exists. The Petitioners in purchasing advertising time, became consumers of a service and thereby engaged in "trade and commerce." The sale of services has been specifically included within the ambit of the "trade or commerce among the several states" language found in 15 U.S.C. 1 (American Medical Association vs. U.S., 317 U.S. 519,528, 1942; Radorich vs. National Football League, 452 U.S. 445, 449-452, 1956.

In the case of May vs. Sloan, 101 U.S. 231, (1879), the court construed the word "trade":

> "The word 'trade" in its broadest significance includes not only the business of exchanging commodities by barter but the business of buying and selling for money or commerce and traffic generally.: at P.237

This broad definition of trade was expressly adopted by one Court in construing 15 U.S.C. 1. U.S. vs. San Francisco Electrical Cont. Assn., 57 F. Supp. 57, 63 D.C. N.D. Cal., 1944.

The Court of Appeals in Characterizing the present case as involving "political opponents, not commerce competitors; and political objectives not market place goals" misconstrues the facts of the case. Council for Employment and Economic Energy Use vs. WHDH Corporation, et als __ __ __ p. 6.

Such a view ignores the obvious fact that a well-run political campaign must enter into a variety of transactions wholly commercial in nature designed to obtain the most value for the money spent. Those aspects of the Petitioner's activity which are commercial transactions are protected by the anti-trust laws and fall under the purview of 15 U.S.C. §15. Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972).

The Court's view also fails to recognize the significance of the Petitioner's status as a consumer of a service offered by the radio stations "The end sought (by the enactment of the anti-trust laws) was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods or services." Apex Hosiery Co. v. Leader 310 U.S. 469, 493(1940). It is clear, therefore, that when the Petitioner was confronted by an arbitrary, fixed, industry-wide ratio of reply broadcast time, the Petitioner was denied the opportunity to seek a ratio which would have provided better value for its radio advertising expenditures. Indeed the Petitioner was denied the freedom of the market place which the Sherman Act was meant to insure. Petitioner's status as a consumer, therefore, is alone sufficient to confer standing to sue. Clearey v. Chalks 488 F.2d 1315, 1319 Note 17, D.C. Cir (1973), Cert.denied 416 U.S. 938.

The restraint in the present case is one of the class of restraints on trade which Congress intended to be covered by the Sherman Act. The Congress intended the Act to apply to "... monopolistic practices and restraints upon trade injurious to purchasers and consumers of goods and services by preservation of business competition." Apex Hosiery Co. vs. Leader, supra, p.490 Such "... combinations [are]

ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements ..." Eastern Railroad Presidents Conference vs. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961)

The combinations which are proscribed by the act have the characteristics of common law restraints of trade. And, in fact, this is the true test which the courts apply in determining whether the act applies to a particular restraint. In analyzing the Act's provisions, the Court has stated:

> " ... the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or

had not brought about the wrong against which the statute provided." Standard Oil Co. v. U.S., 221 U.S. 1, 59-60 (1910)

This test has been adopted and carried forward in more recent cases Klor's, Inc. vs. Broadway Hale Stores, Inc., 359 U.S. 207, 211, (1959) Schatte vs. International Alliance, etc., 182 F.2d 158, 167 9th Cir (1950).

Viewed under this test, the Respondent's conduct clearly falls within the terms of the Act. Four commercial radio broadcasters conspired to arbitrarily set the ratio of commercials broadcasted in opposition to those purchased by Petitioner. In effect, the Respondent - broadcasters, by conspiring, arbitrarily determined the number of opposition commercials to be subsidized by the Petitioner when purchasing air time of its own. The Respondents' conduct is clearly analogous to price fixing. Respondents' conduct precluded Petitioner from seeking and securing a more favorable ratio of purchased air time to subsidized opposition time. The effectiveness, and thereby the value, of an advertising expenditure is in direct proportion to the amount of time bought before subsidization of reply time begins. By effectively foreclosing the competition of the market place to Petitioner, Respondents precluded

Petitioner, as a consumer, from securing the best possible value for its advertising dollar spent. At issue is not the fact that MFSI, Petitioner's opponent, was given reply time in accordance with the Fairness Doctrine. Nor is the issue the validity of the precise ratio at which the reply time was allocated. The issue rather is that all four Respondents conspired to arbitrarily set a uniform ratio which foreclosed the competitiveness of the marketplace to Petitioner in its search for "the best buy" in radio advertising. Respondents' conduct, therefore, is a clear restraint on the purchase of a service which caused the Petitioner to curtail its radio advertising. Such conduct clearly falls within the proscription of the Sherman Anti-Trust Act.

II The Court of Appeals Erred in Holding that the Present Case Falls Within One of the Exemptions to the Sherman Anti-Trust Act.

The present case does not fall within any of the judicially recognized exemptions to the Sherman Anti-Trust Act. Initially it is important to note that "exemptions from the rule of unfettered competition for particular forms of combination and particular kinds of anti-competitive practices ... are narrowly construed" George R. Whitten Jr.,Inc.

vs. Paddock Pool Builders, Inc., supra, p.30; AR-EX Products Co., vs. Capital Vitamin and Cosmetic Corp., 351 F.2d 938, 940 1st Cir 1965; Pacific Seafarers Inc. vs. Pacific Far East Line, Inc. 404 F.2d 804, 818-819 cert.denied 393 U.S. 1093 D.C. Cir 1968.

The rationale behind this rule was articulated by the Supreme Court in Carnation Co. vs. Pacific Westbound Conference, 383 U.S. 213, 1965. In writing for a unanimous court, Chief Justice Warren stated:

> "We have long recognized that the anti-trust laws represent a fundamental national economic policy and have therefore concluded that we can not lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the anti-trust laws wholly inapplicable to that industry." at p.218

The Carnation case does point to one set of circumstances in which an exemption may be inferred: that in cases of "plain repugnancy between the anti-trust and regulatory provisions," supra, p.217. This exception is inapplicable, however, because the

present case is entirely devoid of any regulation or for that matter any statute, policy or constitutional provision to which the enforcement of the anti-trust laws are repugnant. Nor does the record reveal any justification for setting aside national economic policy in this case.

There is nothing in the Fairness Doctrine which required the Respondent broadcasters to meet their "Fairness Doctrine" obligations in the particular fashion in which they did. There is certainly nothing in the Doctrine which either required or permitted the Respondents to injure the Petitioner by conspiring to set the ratio of paid advertisements to free reply advertisements in restraint of trade.

Indeed, "the fact that there is substantial regulation does not preclude the regulatory agency from drawing on competition for complementary or auxiliary support. Satisfactory accomodation of the peculiarities of individual industries to the demands of the public interest necessarily in each case a blend of private focus." Federal Communications Commission vs. RCA. Communications, Inc. 346 U.S. 86, 93 (1953).

It is clear that the antitrust laws and the "Fairness Doctrine" are quite compatible with each other. The requirements of both would have been met in the present case if each Respondent had provided those with opposing points of view a reasonable opportunity to respond over their facilities while at the same time taking care to determine what was reasonable without conspiring with other radio stations.

A. The Present Case Does Not Fall Within the Noerr Motor Freight Exemption to the Sherman Act.

In specifically holding that the present case falls within the Noerr Motor Freight exemption to the Sherman Act, the Court of Appeals has failed to recognize the significant factual distinctions between the two cases. In Eastern Railroad Presidents Conference vs. Noerr Motor Freight, Inc. 365 U.S. 127 (1961), the plaintiff and defendant in the original suit were commercial competitors. The defendant had mounted a campaign to detrimentally influence the opinions of both the legislature and the general public as regards the plaintiff. In response to this political threat, the plaintiff attempted to invoke the Sherman Act to halt the defendants' tactic. Essentially, Noerr presents

commercial competitors embroiled in a political dog-fight with one of the combatants attempting to use the Sherman Act to silence its political rival. Within this context, the significance of the Court's holding in Noerr can clearly be realized.

" ... the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly" Noerr, supra, p.136. In further elucidating the Noerr Decision, the Court in United Mine Workers of America vs. James M. Pennington 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed 2d 626, 636 (1965) stated: "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."

Essentially, therefore, Noerr intends to preclude the use of the Sherman Act as a political tool. While the efficacy of this holding is obvious, the Noerr Decision is inapplicable to the present case.

The present record reveals that the Petitioner and Respondent broadcasters exist, in a commercial context as consumer and vendor respectively. They do not exist, however, as political opponents locked in a political battle

to influence the electorate or government. Petitioner's political opponent is MFSI, not the Respondent broadcasters. In the present case Petitioner is a consumer who has purchased a service from Respondent broadcasters. Petitioner is not attempting to use the Sherman Act as a political tool.

In view of its narrow scope, the Noerr doctrine ought not to be extended to cover the present case because the Respondent broadcasters were not trying to gain access to nor to influence any governmental policy makers. Enforcement of anti-trust laws against them will not inhibit them within the meaning of Noerr. In addition, to suggest that giving the Petitioner the benefit of the anti-trust laws will inhibit the broadcasters' access to government policy makers is patently absurd.

An examination of the reasoning of Justice Black also demands the conclusion that the Noerr exemption does not apply to the present case. The Noerr Decision rests on two grounds, neither one of which appears in the present case:

> "In the first place ... to hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.
>
> "Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." Noerr, supra p.137-138

Petitioner is not attempting to use the Sherman Act to silence its political opponent, MFSI. Rather, Petitioner is attempting through its invocation of the Sherman Act to protect its consumer right to a freely competitive market place when purchasing broadcast advertising time.

It bears repeating that at issue is not that MFSI, Petitioner's opponent, was given reply time in accordance with the Fairness Doctrine. Nor is the issue the validity of the precise ratio at which the reply time was allocated. The issue is that all four Respondents conspired to arbitrarily set a uniform ratio which foreclosed the competitiveness of the market place to Petitioner in its search for the "best buy" in radio advertising. The issue is not political activity. The issue is purely a commercial activity, and is, therefore, beyond the scope of the Noerr exemption.

B. The Present Case Does Not Fall Within Any Other Recognized Exemption to the Anti-Trust Laws.

The case of Apex Hosiery Co. vs. Leaders, 310 U.S. 469 (1940) is clearly distinguishable from the present case. The Apex case involved the forceable and violent takeover of the plaintiff's factory by a union during a strike and the wanton destruction of the plaintiff's property by the defendant. The Court, in deciding that there was no jurisdiction under the Sherman Act, stated:

> "The legislative history of the Sherman Act, as well as decisions of this Court interpreting it, show that it was not aimed at policing interstate transportation or movement of goods and properties ... they do not suggest that in several states law or law enforcement machinery were inadequate to prevent local obstacles or interferences with interstate transportation ... "
> at pps. 491-492

Read narrowly, as all cases setting forth exemptions to the anti-trust laws must be (see George R. Whitten, Jr., Inc. vs. Paddock Bond Builders, Inc., supra; AR-EX Products, Co. vs. Capital Vitamins and Cosmetic Corporation, supra, the Apex case is merely an illustration of the well recognized "Labor" exemption. See U.S. vs. Hutchinson, 312 U.S. 219 (1941); Allen Bradley Co. vs. Electrical Workers Local 3, 325 U.S. 797 (1945).

The holding in Apex is indeed based on the "Labor exemption" rationale.

"A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a 'restraint of trade.' Since the enactment of the declaration in §6 of the Clayton Act that 'the labor of a human being is not a commodity or article of commerce ... nor shall such [labor] organizations, or the members thereof be held or construed to be illegal combinations or conspiracies in the restraint of trade under the anti-trust laws' it would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act." Apex, supra at 502-503.

The present case does not deal with labor as a "commodity or article of commerce." It is clear, therefore, that Apex and its progeny are inapplicable to the present case.

III. The Court of Appeals Erred In Granting The Respondent's 12(b)6 Motion to Dismiss For Failure To State A Claim

Initial inquiry into FRCP 8 reveals that "All the rules require a 'short and plain statement of the claim' that will give the defendant fair notice of that the plaintiffs claim is and the grounds upon which it rests." (Conley v. Gibson, 355 U.S. 41, 47 1957)

"In appraising the sufficiency of the Complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." Conley v. Gibson, supra, at p. 46. See also Sarter v. Mays, 491 F. 2d 675, 676 5th Cir. 1974; Brett v. First Federal Savings and Loan Association, 461 F. 2d 1155, 1157 5th Cir. 1972; DiGuardi v. During, 139 F. 2d 774, 775, 2nd Cir. 1944; Continental Colleries v. Shober, 130 F. 2d 631, 634 3rd Cir. 1942.

The test of the sufficiency of the Complaint is not different when the allegations involve violations of the Sherman Act nor does the fact that "the Complaint uses conclusory terms and omits specific factual allegations" (Undenstock v. American Mortgage and Investment Co. of Oklahoma, 495 F. 2d 589, 592 10th Cir. 1974) render the Complaint dismissable. The Complaint alleges a conspiracy "in violation of 15 U.S.C. 1 and 15 U.S.C. et seq."

(Complaint, paragraph 14). It certainly cannot be said of such an allegation that "plaintiff can prove no set of facts in support of his claim". Conley v. Gibson, supra.

The definitive word on the question of adequacy of an anti-trust complaint was spoken by the Supreme Court in U.S. v. Employing Plasterers Assn., 347 U.S. 186. In that case the government's complaint alleged detailed facts regarding a restraint of competition among Chicago Plastering Contractors. But there were no specific facts alleged regarding interstate commerce. The complaint merely alleged that the effect of the local restraint was to restrain interstate commerce. In holding that these conclusionary statements regarding interstate commerce were sufficient to withstand a motion to dismiss, the Court stated:

> "The District Court did not question that the foregoing and other factual allegations showed a combination to restrain competition among Chicago plastering contractors. But the court considered these allegations to be 'wholly a charge of local restraint and monopoly,' not reached by the Sherman Act. And the court held that there was no allegation of fact which showed that these powerful local restraints had a sufficiently adverse effect on the flow of plastering materials into Illinois. At this point we disagree. The

> complaint plainly charged several times that the effect of all these local restraints was to restrain interstate commerce. Whether these charges be called 'allegations of fact' or 'mere conclusion of the pleader', we hold that they must be taken into account in deciding whether the Government is entitled to have its case tried." U.S. vs. Employing Plasterers Assn., 347 U.S. 186, 188 (1953).

Similarly, the Petitioner's conclusionary statements regarding the effects of the Respondents' restraint on interstate commerce must be taken into account and the Petitioner's complaint sufficiently alleges a restraing on interstate commerce.

The allegation that the restraint relates to "trade or commerce among the several states or foreign nations" (15 U.S.C. 1) is adequate to withstand a Motion to Dismiss.

The Petitioner's Complaint need not set forth the specific fashion in which interstate commerce is affected.

> "The decisive answer to respondant's arguments that the complaint failed to set forth specific facts to support its general allegations is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim" Conley v. Gibson, supra, at p. 47.

"...where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out specific facts can seldom be justified. If a party needs more facts, it has a right to call for them under Rule 12(e) of the Fed. R.Civ. P." U.S. v. Employing Plasterers Assoc., 347 U.S. 186, 189.

If the facts are not fully developed in the complaint subject matter jurisdiction under 15 U.S.C. 1 cannot be conclusively determined at this stage of the proceedings.

In the case of Mitchell Woodbury Corp. v. Albert Pick Barth Co., 41 F. 2d 148, 150 1st Cir. 1930, the Court in holding that an anti-trust declaration set forth a cuase of action stated:

"It can hardly be said that allegations that the defendants entered into a conspiracy to restrain the competition of the plaintiff in trade and commerce among the several states, and to deprive it of its business and to obtain that business for the defendants, the defendants do not charge with substantial certainty an intent to restrain commerce and the full and free flow of interstate competition. Addyston Pipe Co. v. U.S., 175 U.S. 211.:

The Petitioner's allegation that the Respondents' conspiracy was "in restraint of trade" and in violation of 15 U.S.C. 1 clearly contains an allegation that interstate commerce was restrained. Such an allegation falls within the bounds of the Mitchell Woodbury case and "charges with substantial certainty" a restraint of commerce.

In the case of Sam S. Goldstein Industries, Inc. v. Botany Industries, Inc., 301 F. Supp. 728, 733, D.C. S.D. N.Y. 1969, the Court sets forth the test whereby anti-trust complaints are to be judged:

"The Court of Appeals of this circuit has stressed the proposition that a complaint charging anti-trust violations neeed not plead 'special' facts but need only disclose adequate information as to the basis of the plaintiff's claim for relief. The details of plaintiff's claim must be developed through utilization of the discovery process."

In the present case the Petitioner have set forth the nature of the conspiracy and the exact agreement between the Respondents. The complaint is sufficiently detailed because it "... informs defendant of all those acts which it is called upon to defend" Sam S. Goldstein Industries, Inc. v. Botany Industries, Inc., supra, p. 733.

Viewed in the light of the foregoing the Petitioner may meet the "affect on interstate commerce test" in a number of ways consistent with the allegations in its pleadings. It may show that the restraing actually is an integral part of an interstate transaction even though the restraing takes place totally intra-state (Goldfarb v. Virginia State Bar, supra).

> "There is an obvious distinction to be drawn between the course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its source upon activity which affects commerce between states" Goldfarb v. Virginia State Bar, supra.

In striking down a Virginia State Bar Association minimum fee schedule for title searches, the Court in Goldfarb found that:

> "a title examination is an integral part of obtaining a mortgage and since mortgages involve the flow of money across state lines, the requisite interstate element was present."

Similarly, in the case of Mandeville Farms, Inc. v. Sugar Co. 334 U.S. 219 (1948), the Court held that the growing of sugar beets was so linked to the process of the manufacture and inter-

state sale of sugar that a restraint against California Sugar Beet growers who sold their entire crop solely within the State of California that the requisite interstate nexus was present to confer Sherman Act jurisdiction.

Further, Petitioner may show that the amounts of money actually expended for radio advertisments and advertising consultants decreased as a result of the Respondents conspiracy thus decreasing the total amount in interstate commerce.

Therefore, the Petitioner submits that the allegations in its Complaint satisfy the "affect on interstate commerce" test and the Complaint should not have been dismissed on that basis.

15 U.S.C. 15 imposes the additional requirement upon the Petitioner of demonstrating that is has been injured in its business or property:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained and the cost of suit, including reasonable attorney's fees"
> 15 U.S.C. 15

The Petitioner has alleged that as a result of the Respondents' conspiracy it sustained "money damages". Such allegation is an entirely sufficient allegation of injury to business or property.

In adopting 15 U.S.C. 15 the Congress intended that the sustaining of money damages should be recoverable. It provides that the plaintiff "shall recover threefold the damages sustained by him". The Courts have consistently held that money is a form of property. "The damage complaint must almost or quite always be damage in property, that is money of the plaintiff, which is owned within some particular state" Chattanooga Foundry v. Atlanta, 203 U.S. 390, 397 (1906). And "A person whose property is diminished by a payment of money wrongfully induced is injured in his property" Chattanooga Foundry v. Atlanta, supra, p. 396.

In the case of Rea v. Ford Motor Company, 497 F.2d 577, 591 3rd Cir. (1974) cert denied 419 U.S. 686 (1974) the Court indicated that a showing that:

> "the price which auto rental companies would have had to pay per car was $76 higher than the formula price"

was sufficient to meet the injury in "business or property" requirement of 15 U.S.C. 15. The view that money damages are an injury to property has been reaffirmed in the recent case of Hanover

Shoe v. United Shoe Machine, 392 U.S. 481 (1967) in which the Court stated:

> "Fundamentally, this is the view stated by Mr. Justice Holmes in Chattangooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906), where Atlanta sued the defendants for treble damages for antitrust violations in connection with the city's purchases of pipe for its waterworks system. The Court affirmed a judgment in favor of the city for an amount measured by the difference between the price paid and what the market or fair price would have been had the sellers not combined, the Court saying that the city 'was injured in its property, at lease, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property.' Id., at 396. The same approach was evident in Thomsen v. Cayser 243 U.S. 66 (1917), another treble damage anti-trust case." at pps. 489-490.

Nor by the clear terms of the statute does the Petitioner have to show an injury to his business if he can show an injury to his property. See also Chattanooga Foundry v. Atlanta, supra, pp. 396-7.

Nor does the Petitioner have to explicitly set forth in its Complaint

the precise manner in which it was injured. In Quimonez v. National Association of Security Dealers, Inc. 540 F. 2d 824 the Court stated:

> "In order to state a treble damage claim under §4 of the Clayton Act the plaintiff must allege 'injury in his business or property' by acts of the defendants which are in violation of anti-trust laws." at p. 829.

This the Petitioner has done and as such this Complaint is sufficient to withstand a Motion to Dismiss. See also Allied Elec. Supply Co. v. Motorola, Inc. 369 F. Supp. 133; 135 D.C. W.D. Pa.

IV. The Court of Appeals Erred In Denying The Injunctive Relief the Petitioner Sought

There is no requirement under 15 U. S.C. 26 of a showing of an injury to commercial interests.

> "In contrast to Section 4, Section 1y of the (Clayton Act, 15 U.S.C. §26) does not involve punitive and potentially disastrous judgments for treble damages and attorneys' fees; neither is there the potential threat of duplicative recoveries." See Hawaii, supra, at 261-264. Consequently, courts have not exercised the same pronounced restraint in granting standing under Section 16 as they have done under

> Section 4. As we observed in Hawaii v. Standard Oil Co., 431 F. 2d 1282, 1284-1285 (9th Cir. 1970), aff'd 405 U.S. 251, 92 S. Ct. 885, 31 L.Ed. 2d 184 (1972):
>
> "'(Section 16) is far broader than §4. Any person may secure injunctive relief against threatened loss or damage by violation of the antitrust laws. Section 4 provides for recovery of treble damages only by a person injured in his business or property by (reason of) such violation.'"
>
> "Unlike standing under Section 4, standing under Section 16 does not require an injury to 'commercial interests' but only an injury cognizable in equity. For example, housing segregations enforced by an antitrust conspiracy of realtors constitutes an injury to excluded minority members that confers standing for injunctive relief under Section 16, see Bratcher v. Board of Realtors, 381 F. 2d 723 (6th Cir. 1967), although not for treble damages under Section 4." In re; Multi District Vehicle Air Pollution M.D.L. 31 481 F. 2d 122, 130, 9th Cir. (1973)

The Court of Appeals denies injunctive relief upon the ground that the claim brought by Petitioner has no prospective ramifications and is therefore moot in regards to injunctive relief. Council

for Employment Economic Energy Use v. WHDH Corp. et als, No. 77-1283 (1978) p. 6 N.5.

This holding in the present case ignores the same Court's conclusion in a companion case arising out of the identical facts of the present case. In Council for Employment and Economic Energy Use v. Federal Communications Commission and The United States of America, 575 F. 2d 511 (5) (1st Cir. 1978) the Court concluded that the claim was not moot. In reaching this conclusion, the Court specifically enumerated several factors:

> "The question addressed in the 1976 election--whether electric utilities may be allowed to sell power at a discount to large consumers--remains a live issue in Massachusetts. Further efforts are underway to prohibit these discounts, which the Council will oppose...Under Massachusetts law a political organization such as the Council does not come to an end automatically upon the passing of the particular election for which it was organized. See Mass. Gen. Laws. Ch. 55, §6. The very fact that the council continues to seek a decision after the election is some indication that its concern is real and continuing."

The Court's analysis clearly delineates the future ramifications which

mandate injunctive relief as an appropriate remedy. Unless injunctive relief is granted, the Petitioner will confront the same restraining upon its access to the free competiveness of the marketplace in purchasing radio advertising time in its future campaigns. Unless restrained by the Courts, the Respondent broadcasters will continue to trangress the anti-trust laws by arguing to arbitrarily set the ratio of response broadcast time to the detriment of the Petitioner, as consumer.

CONCLUSION

For these reasons a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

/s/ Albert P. Zabin
1 Center Plaza
Boston, MA 02108

/s/ Sanford A. Kowal
294 Washington Street
Boston, MA 02108

ADDENDUM

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COUNCIL FOR EMPLOYMENT AND ECONOMIC ENERGY USE,
Plaintiff

V.

WHDH CORPORATION, ET AL,
Defendants

CIVIL ACTION NO. 76-3965M

MEMORANDUM AND ORDER

MURRAY, District Judge

This case came on to be considered on the motions to dismiss for failure to state a claim, Fed. R. Civ. P. 12(b)(6), filed by defendants WHDH Corporation, General Electric Broadcasting Company, Inc., and Plough Broadcasting Company, Inc., and the same defense as set forth in the answer of of defendant RKO General, Inc., and on the papers filed in support of the motions. Adequate opportunity was afforded plaintiff

to file a memorandum or brief in support of the complaint and in opposition to the motions to dismiss. No supporting documents were filed by plaintiff.

Upon consideration of plaintiff's claims under Sherman Act, §1, 15 U.S.C. §1 (1970), as amended, and in light of the arguments in the memoranda of counsel for the three defendants on the motions to dismiss, it is clear that "...plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief...". Conley v. Gibson, 355 U. S. 41, 45-46 (1957). See Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); Rea V. Ford Motor Co., 497 F. 2d 577 589-90 (3rd Cir.), cert. denied, 419 U.S. 868 (1974); cf. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969); Fairness Doctrine and Public Interest Standards, 48 F.C.C. 2d 1 (1974). See generally U.S. Const. Amend. I.

Accordingly, it is hereby ORDERED that the complaint be dismissed for failure to state a claim upon which relief can be granted.

/s/ Frank J. Murray
United States District Judge

May 10, 1977

United States Court of Appeals
For the First Circuit

No. 77-1283

COUNCIL FOR EMPLOYMENT AND ECONOMIC ENERGY USE,

PLAINTIFF, APPELLANT,

v.

WHDH CORPORATION, ET ALS.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[HON. FRANK J. MURRAY, *U.S. District Judge*]

Before COFFIN, *Chief Judge*
CAMPBELL, *Circuit Judge*
WOLLENBERG*, *District Judge*

Sanford A. Kowal, with whom *Sallop, Kowal & Davis, Assoc.* was on brief, for appellant.

John R. Hally, D. Todd Christofferson and *Robert W. Meserve*, with whom *Alan D. Mandel* and *Nutter, McClennen & Fish* were on brief, for appellees.

June 23, 1978

WOLLENBERG, *District Judge*. This private antitrust action was brought in the District Court for the District of Massachusetts on November 2, 1976, by a political committee,[1] the

* Of the Northern District of California, sitting by designation.

[1] A political committee is defined by Massachusetts General Laws, ch. 55, § 1 in part as:

> . . . any committee, association, organization or other group of persons . . . which receives contributions or makes expenditures . . . for the purpose of opposing or promoting a charter change, referendum question, constitutional amendment, or other question submitted to the voters.

Council for Employment and Economic Energy Use (the Council), against four radio station operators, WHDH Corporation, General Electric Broadcasting Co., Inc., RKO General Broadcasting, Inc., and Plough Broadcasting Co., Inc. (the broadcasters). The Council alleged in its complaint that the broadcasters had entered into a conspiracy in restraint of trade[2] in violation of section 1 of the Sherman Antitrust Act[3] by agreeing together on an amount of free advertising time to provide opponents of the Council's position on a public initiative referendum question to be voted upon on the November, 1976 Massachusetts ballot. The Council sought money damages pursuant to section 4 of the Clayton Act[4] and injunctive

[2] The complaint alleged that:

> On or about October 8, 1976, defendants, their agents, servants, or employees, entered into an illegal combination and/or conspiracy in restraint of trade by doing acts, including providing that for every two advertisements on their radio stations purchased by the plaintiff, their agents, servants, or employees, to promote the plaintiff's opposition to [the ballot issue], said defendants, their agents, servants, or employees, would provide one free advertising space to the opponents of the position of the plaintiff on the referendum [ballot issue]. This was done without any inquiry by the defendants, their agents, servants or employees, of the ability to pay of the opponents to the plaintiff's and without reference to the different coverage of [the ballot issue] afforded by each individual radio station owned by the defendants.
>
> In fact said defendants, from on or about October 8, 1976, continuing to the date of the election, did provide free space to the opponents of the plaintiff's position . . . on the basis of one free advertising space for each two spaces purchased by the plaintiff.

[3] 15 U.S.C. § 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

[4] Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden by the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained. . . .

relief pursuant to section 16 of the Clayton Act[5]. Motions to dismiss for failure to state a claim upon which relief could be granted were filed by three of the broadcasters in January, 1977.[6] The Council was subsequently granted several extensions of time within which to file a brief in opposition to the broadcasters' motions to dismiss. However, a fourth such motion for an extension was denied on May 5, 1977,[7] and on May 10, 1977, the trial court entered an order pursuant to Fed. R. Civ. P. 12(b)(6) dismissing the Council's complaint. On May 13 the Council filed a motion to vacate the order of dismissal and on May 20 filed a motion to alter the judgment of dismissal by vacating it to permit the filing of an amended complaint. Both of these motions were denied on May 24, 1977.[8]

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[5] Section 16 of the Clayton Act, 15 U.S.C. § 26, provides:

> any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . .

Since the Council has succeded in the political objective for which it was organized of defeating Question 7 on the November, 1976, Massachusetts ballot, and apparently will not in the future be seeking broadcast time, we see no basis for considering the claim for injuctive relief against the broadcasters.

[6] One of these defendants, Plough Broadcasting Co., moved in the alternative for summary judgment. This motion was supported by the affidavit of the General Sales Manager of several radio stations in the Boston area owned by Plough Broadcasting Co., to the effect that there was no conspiracy but rather that decisions concerning ballot proposition broadcasts were made independently by the stations for the purpose and with the intent of satisfying the requirements of the fairness doctrine.

[7] The fourth motion was filed after the plaintiff's third extension had expired on April 25, 1977. Counsel for plaintiff did not file an opposition to the motion to dismiss made by General Electric Broadcasting Co., Inc., and filed no opposing brief or counter affidavit prior to the order of May 10, 1977, which granted the motions to dismiss.

[8] The order of the court noted that consideration was given to the various motions and supporting memoranda of law filed by the Council subsequent to the dismissal of its complaint on May 10 1977. These included a late brief in opposition to the motions to dismiss and to the motion for summary judgment. The order stated:

> 1) That plaintiff's motion to vacate the order dismissing the complaint is denied as without merit;
>
> 2) That plaintiff's motion to amend the judgment of dismissal by vacating it, under Fed. R. Civ. P. 59(e) is denied as inappropriate; but treating it the same as a motion for relief pursuant to Fed. R. Civ. P. 60(b) it is denied.

The Council appeals from the order and judgment dismissing its complaint and from the denial of its motions to alter the judgment and to vacate the order of dismissal.

FACTS

The Council was organized for the stated purpose of encouraging the creation of employment and opportunities in economic energy use in Massachusetts by defeating an initiative petition which if passed would have had the effect of limiting discounts for volume purchasers of electricity. As part of its political campaign, the Council engaged in extensive advertising in the media, part of which involved the purchase of broadcasting time from the defendants and from other stations in Rhode Island, Massachusetts, and New Hampshire. During the course of the campaign, the broadcasters afforded free air space to Fair Share, Inc., a public interest group supporting the passage of the referendum issue, pursuant to their obligations under the fairness doctrine to provide such time for the dissemination of opposing political views.[9] The Council lodged a complaint on October 26, 1976, with the Federal Communications Commission (FCC) against three of the broadcasters, not including WHDH, stating its belief that Fair Share, Inc. had the financial means of purchasing time on the radio stations since it had purchased a considerable amount of

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[9] *See generally Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); *In re Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1 (1974); *In re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598 (1964); *In re Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963).

broadcast time on a Massachusetts television station subsequent to its receipt of free radio time. The FCC made an initial determination that the broadcasters had acted reasonably in discharging their affirmative responsibility to encourage and implement the broadcast of contrasting views in each station's overall programming.[10] The FCC noted that licensees which had presented one side of a controversial issue of public importance by broadcasting sponsored programming could not reject exposition of contrasting viewpoints on that issue merely because they could not obtain paid sponsorship for that presentation, *citing In re Cullman Broadcasting Co., Inc.*, 40 F.C.C. 576 (1963). The full Commission affirmed this ruling on June 27, 1977. We upheld the Commission's decision in *Council for Employment and Economic Energy Use* v. *FCC*, slip op. (May 4, 1978).

I

The leading case of *Conley* v. *Gibson*, 355 U.S. 41 (1957), aptly set out the established rule for dismissal under Fed. R. Civ. P. 12(b)(6): "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46. The original intent of Congress in enacting the Sherman Act was to suppress and penalize restraints on *commercial competition* in the marketing of goods and services. *Apex Hosiery Co.* v. *Leaders*, 310 U.S. 469, 493, 495 (1940). It is difficult to conceive how the present complaint fits under that general rubric. Moreover, the Supreme Court has made clear its refusal to permit parties to "impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). *See also United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965).

[10] Appendix to appellant's brief at 62-63.

The only exceptions to this rule countenanced by the Court were situations in which the political activity at issue was "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Id.* at 144. Simply stating the exception demonstrates that it has no relationship to the facts alleged in appellant's complaint. This case involves political opponents, not commercial competitors; and political objectives, not market place goals.

Since appellant seems to have great difficulty in understanding the point we carefully point out the differences between the cases it cites in its brief and the present litigation.[11] The cited cases involve commercial enterprises, competing in particular markets, arguing over issues which will determine the commercial success and profitability of one or the other of the parties to the dispute. While the government is involved in all three cases in a commercial or regulatory capacity the contexts of the disputes are fundamentally commercial not political. The present case involves access to the public media by expressly political organizations for the purpose of influencing political decisions of the general electorate.

If appellant's view of the Sherman Act's scope prevailed, it is difficult to imagine why every dispute in a political contest among the major political parties would not implicate the antitrust laws. This of course is precisely what the Supreme

[11] The lower court cases cited by appellant are clearly inapposite to the present case. *George W. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), involved direct commercial competitors attempting to sell their products to public bodies under competitive bidding procedures. *Hecht* v. *Pro Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), concerned attempts by hopeful football franchise owners to alter a restrictive covenant in a public stadium lease that permitted only one football franchise owner to have access to the stadium. In *Woods Exploration and Producing Co., Inc.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), certain owners of tracts of land in a natural gas field accused other owners of giving false data to a state commission regulating natural gas production.

Court in the *Noerr* case indicated it was attempting to avoid. The Court explained, "Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical." *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc., supra* at 141 (footnote omitted).

California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508, 513-14 (1972), does not support appellant's claim. There, the Supreme Court concluded that, "A combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the agencies and the courts" would result in an antitrust violation. *Id.* at 515. We find no such denial in the present case. In *Council for Employment and Economic Energy Use* v. *FCC, supra*, we rejected appellant's claim that the action of radio stations in giving the Council's political opponents a fixed ratio of free reply time to the Council's paid political advertising violated the Council's first amendment rights with this comment,

> The argument is patently absurd; these ratios, even if they were as rigidly imposed as the Council represents, in no way restricted the amount of time available to the Council. The Council's only complaint is that its opponents also had an opportunity to communicate their views. It would be a novel interpretation of the first amendment to find within its strictures a right not to be controverted in public political debate.

Id. at 7.

Any contention that providing public air time to one's opponents somehow denies a party free and unlimited access to government agencies, the courts, or any part of the political process is equally meritless. Petitioner's proper avenue for judicial relief was exercised through FCC administrative

channels and in judicial review of the FCC's decision. The antitrust laws provide no further remedy.

II

We also determine that the motions to vacate or alter the judgment were properly denied by the district court. It is clear that a Fed. R. Civ. P. 60(b) motion is not a substitute for the normal appeal procedure and is not a means for the mere reconsideration of a litigant's previously existing case. *Kowall* v. *United States*, 53 F.R.D. 211, 216 (W.D. Mich. 1971). Normally leave to amend should be liberally granted following dismissal on the pleadings. *Foman* v. *Davis*, 371 U.S. 178, 182 (1962). However, we cannot say it was an abuse of the court's discretion not to allow an amendment to the complaint which would be futile. *See Ondis* v. *Barrows*, 538 F.2d 904, 909 (1st Cir. 1976); *United States* v. *Newbury*, 123 F.2d 453 (1st Cir. 1941); *Stebbins* v. *Weaver*, 537 F.2d 939, 942 (7th Cir. 1976). Amendments would not change the essential charge which today we find not to constitute an antitrust violation. We therefore find that it was proper for the court, having dismissed the complaint as not stating sufficient facts on which to base an antitrust claim, to deny the motions to amend that judgment and allow amendments to the pleadings.

Affirmed. Double costs.

Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.

CERTIFICATE OF SERVICE

I, Sanford A. Kowal, co-counsel for the Council for Employment and Economic Energy Use, Petitioner herein, do hereby certify that I have this 21st day of September, 1978, served three copies of the within and foregoing Petition for a Writ of Certiorari to the First Circuit Court of Appeals by mailing copies first class postage prepaid to: John R. Hally, Esquire, Nutter, McClennen & Fish, 75 Federal Street, Boston, MA 02110; D. Todd Christofferson, Esquire, 1225 Connecticut Avenue, N.W., Suite 500 Washington, D.C. 20036; and Robert J. Meserve, Esquire, Newman & Meserve, 125 High Street, Boston, MA 02110, counsel for respondents herein.

Sanford A. Kowal
Attorney at Law

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK:SS SEPTEMBER 21, 1978

Then personally appeared before me the above named Sanford A. Kowal and made oath that the foregoing was true.

Notary Public

My Commission
Expires: Dec. 22 1982